

**IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO
CIVIL DIVISION**

**ELLORA'S CAVE PUBLISHING,
INC., et al.**

Plaintiff,

-VS-

**DEAR AUTHOR MEDIA NETWORK,
LLC, et al.**

Defendants.

CASE NO.:

JUDGE

**MOTION FOR TEMPORARY
RESTRAINING ORDER**

NOW COME Plaintiffs, by and through undersigned counsel, and hereby move the Court for a Temporary Restraining Order to enjoin the Defendants from publishing false and defamatory statements about Plaintiffs and their business. The reasons in support of this Motion are detailed in the attached Memorandum.

Respectfully submitted,

**NIEKAMP, WEISENSELL, MUTERSBAUGH, &
MASTRANTONIO, LLP**

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Daniel M. Horrigan, Summit County Clerk of Courts

**MEMORANDUM IN SUPPORT OF THE MOTION OF ELLORA'S CAVE
PUBLISHING, INC. AND JASMINE JADE ENTERPRISES FOR A TEMPORARY
RESTRAINING ORDER AND A PRELIMINARY INJUNCTION AGAINST
DEFENDANTS DEAR AUTHOR MEDIA NETWORK, LLC AND JENNIFER
GERRISH-LAMPE AKA JANE LITTE**

STATEMENT OF FACTS

Ellora's Cave Publishing, Inc. ("Ellora's") is a leading online publisher of female oriented romance novels. Dear Author Media Network, LLC ("Dear Author") is a media outlet who publishes articles on its blog entitled 'Dear Author' (the "Blog"). Jennifer Gerrish-Lampe ("Lampe") is the owner of Dear Author who submits writings to be published on the Blog under the name Jane Litte. On September 14, 2014, Lampe wrote and published on the Dear Author blog an article entitled "The Curious Case of Ellora's Cave" (the "Blog Publication"). The Blog Publication contains numerous false and defamatory statements about Ellora's financial condition which are intended to place the company in a negative light and induce panic in its staff and online authors. The Blog Publication also falsely and maliciously impugns the integrity of Plaintiffs and of their officers with respect to the Companies' internal financial dealings. The false statements are detailed and incorporated in this motion through the Affidavit of Patricia Marks, which is attached hereto as Exhibit A. This Blog Publication has caused distress among contracted authors, employees and other contractors and has further impeded Ellora's ability to enter into new contracts with prospective authors, employees, and contractors by shaking their confidence in Ellora's business dealings and financial stability. The Blog Publication also maliciously or recklessly makes false statements against Jasmine Jade Enterprises thereby negatively impacting Jasmine Jade's business.

I. STANDARD OF REVIEW

The purpose of a temporary restraining order is to preserve the status quo or prevent irreparable harm. According to Ohio courts, a party requesting a preliminary injunction (and/or a temporary restraining order) must show that: “(1) there is a substantial likelihood that the plaintiff will prevail on the merits, (2) the plaintiff will suffer irreparable injury if the injunction is not granted, (3) no third parties will be unjustifiably harmed if the injunction is granted, and (4) the public interest will be served by the injunction.” *Mike McGarry & Sons, Inc. v. Robert Gross, et al.*, 2006 Ohio 1759, P10 (8th Dist.) (citing *Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267 (2000)).

The plaintiff must establish each element by clear and convincing evidence which will provide the court with a firm belief as to the facts sought to be established. *Cincinnati Bar Assn. v. Massengale*, 58 Ohio St. 3d 121, 122 (1991). “However, in determining whether to grant injunctive relief, no one factor is dispositive” and the courts must balance all four factors with the “flexibility which traditionally has characterized the law of equity.” *McGarry & Sons* at P11 (citing *Cleveland v. Cleveland Elec. Illum. Co.*, 115 Ohio App.3d 1, 14 (1996)).

The purpose of a preliminary injunction “is merely to preserve the relative positions of the parties until a trial on the merits can be held.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). A temporary restraining order, for that matter, “is customarily granted on the basis of procedures less formal and evidence less complete than one would find in the record of a trial on the merits.” *Midwest Retailer Associated, Ltd. v. City of Toledo*, 563 F. Supp. 2d 796, (N.D. Ohio 2008) (citing *Univ. of Tex. v. Camenisch*).

II. ANALYSIS

A. Likelihood of Success on the Merits

Ellora's and Jasmine Jade has a substantial likelihood of success on the merits against Defendants, based upon the fact that the Defendants have published false statements on its website about Ellora's business practices and financial status. In order to prevail in a Defamation suit, plaintiffs must establish (1) the statements are false, (2) the statements are defamatory toward Plaintiff, (3) the statement was made in writing, (4) the statement was published, and (5) the defendants are guilty for some degree of fault. *Hersch v. E.W. Scripps Co.* 3 Ohio App.3d 367, 374 (1981).

In this case, the testimony of Patricia Marks establishes that the statements detailed in the attached Affidavit made by Defendants are false. The statements are also defamatory in that they consist of attacking Plaintiffs' good will and business reputation. Whether a statement is defamatory is determined not only by the words themselves, but also how the words are used within the context of the entire publication and what implications the publication is calculated to convey to the reader. *Am. Chem. Soc'y v. Leadscape, Inc.* 133 Ohio St.3d 366 (2012). The Blog Publication clearly insinuates that Ellora's is a failing company and cautions authors, employees, from contractors from associating or doing business with Ellora's Cave. Based on these statements, Ellora's has a strong possibility of success on the merits of its claims.

B. Irreparable Injury

It is clear that Ellora's will suffer irreparable injury if Defendants are allowed to continue to publish the Blog Publication on the internet. Contracted authors of Ellora's have already started contacting the company regarding the status of business affairs and concerns over intellectual property rights in the event of a bankruptcy. Further, employees and contractors

have contacted Ellora's expressing concern over whether they will be compensated as required under their contracts. Finally, potential authors are being negatively influenced against contracting with Ellora's as a result of the Blog Publication. While some of this damage can be quantified into monetary terms, much of it, such as the lost opportunities to sign new authors and the loss of good will, are not quantifiable in dollars.

If the Court has concerns with Ellora's assertion of incalculable and irreparable injury, it should be noted that "other courts have held that, 'when there is a strong likelihood of success on the merits, preliminary injunctive relief may be justified even though plaintiff's case of irreparable injury may be weak.'" *McGarry v. Gross*, 2006 Ohio 1759 at P19 (8th Dist.) (quoting *Blakeman's Valley Office Equip., Inc. v. Bierdeman*, 152 Ohio App.3d 86 (2003) quoting *Cleveland Elec. Illum. Co., supra*).

The facts are strikingly similar to *Bluemile, Inc. v. Yourcolo, LLC*. In *Bluemile*, the plaintiff, an Ohio corporation, sought a temporary injunction against the defendant, who owned a website claiming the same business name. *Bluemile, Inc. v. Yourcolo, LLC*, 2011 U.S. Dist. LEXIS 62178 (S.D. Ohio June 10, 2011), at *1-2. The complaint alleged that the defendants defamed and interfered with the plaintiff's business, as false comments on the defendant's website injured plaintiff's business. *Id.* at *2. After balancing the factors and noting that the harm is difficult to quantify, the court granted the injunction, noting that the plaintiff would suffer "irreparable harm and injury" because:

[The] offending materials are accessible via the internet, [and] issuance of the temporary restraining order is not likely to cause substantial harm to the [d]efendants or others before this matter can be resolved on the merits, and the public interest is served by the removal of false and misleading information from the internet. *Id.* at *3-4.

Other states have found that limiting speech can help stop this type of harm. In *Guion v. Terra Marketing*, for example, the Supreme Court of Nevada issued a temporary restraining order to stop the defendant from displaying signs hurting a business's reputation because "the right to carry on a lawful business without obstruction is a property right, and acts committed without just cause or excuse which interfere with the carrying on of plaintiff's business or destroy its custom, its credit or its profits, do an irreparable injury and thus authorized the issuance of an injunction." *Guion v. Terra Marketing*, 90 Nev. 237, 240 (Nevada 1974) (citing *Tappan Motors, Inc. v. Waterbury*, 318 N.Y.S.2d 125 (New York 1971)).

Here, the court should grant the temporary restraining order, as did the court in *Bluemile*, after finding Ellora will likely prevail on the merits, as it is both an available remedy and one to prevent irreparable injury and will protect the public from becoming misled by false information.

C. Substantial Harm to Others

Granting the temporary restraining order will not cause any harm to others. This request for a temporary restraining order is limited in its scope only to Dear Author and Lampe from continuing to publish the Blog Publication and from publishing any new Blog Publications against Plaintiffs. Dear Author and Lampe will be able to continue to operate their business and supply content not in violation of this Temporary Restraining Order for the Blog. Accordingly, there will be no substantial harm to others should this court grant the temporary restraining order.

D. Public Interest

The grant of a temporary restraining order in this case serves the best interests of the public. The public should not be led to believe erroneous libelous statements. It is in the best

interests of the public to prevent such libelous statements and to promote legal forms of free speech, as recognized in *Bluemile*.

CONCLUSION

WHEREFORE, for the above-stated reasons, the Plaintiff, Ellora's Cave Publishing, Inc. and Jasmine Jade Enterprises, LLC, respectfully moves this Honorable Court for a Temporary Restraining Order, pursuant to Ohio R. Civ. P. 65(a), to enjoin Defendants, Dear Author Media Network, LLC and Jennifer Gerrish-Lampe aka Jane Litte, from continuing to publish or publishing in the future any Blog Publications referencing or regarding Plaintiffs in any way. Additionally, Plaintiff request that Defendants disclose the name of the anonymous commenters on the blog so that the spreading of the defamatory statement can be stopped.

Respectfully submitted,

**NIEKAMP, WEISENSELL, MUTERSBAUGH, &
MASTRANTONIO, LLP**

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CERTIFICATE OF SERVICE

I hereby certify that service of the forgoing was requested by the undersigned to be served by the Clerk of Court as an attachment to the Complaint to the Defendants by certified mail at the addresses set forth in the caption by certified mail.

/s/ Steven W. Mastrantonio

Steven W. Mastrantonio